

Honorable Robert S. Lasnik
Noting Date: 3/1/2013

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

James McDonald

Plaintiff

No. C10-1952-RSL

v.

OneWest Bank, FSB,
Northwest Trustee Services,
Mortgage Electronic Registration Systems,
Defendants.

PLAINTIFF'S MOTION FOR
CONTINUANCE OF TRIAL TO ALLOW
EXAMINATION/INSPECTION OF THE
ORIGINAL NOTE AND TO ADD
EXAMINER AS A WITNESS [LCR 7(d)
(2)]

Plaintiff James McDonald respectfully moves the Court to issue an Order Continuing the Trial Date and Allowing the Examination/inspection of the so-called original Note currently in defense counsel's possession and to add the Examiner/Inspector, Dr. James Kelley, as an expert and/or fact witness for purpose of summary judgment and trial. Plaintiff proposes Dr. Kelley as an expert and fact witness pursuant to FRCP 26(b), FRCP 34 and 35, FRCP 37(a)(3)(B)(iv), FCRP 45(c)(2)(B)(i).

II. FACTS WARRANTING COURT ORDER

At the evidentiary hearing held by the Court on January 31, 2013, two versions of the promissory Note were admitted into evidence. The variance is visible in the placement of the stamped blank endorsement. OneWest has sworn that both of these versions are "true and correct copy" of the original. OneWest's lawyers submitted both of these versions in separate

1 proceedings in this Court as well as the Bankruptcy Court seeking rulings in their client's favor
2 (Evidentiary/Oral Record).

3 Defense counsel offered no explanation to the variance. Charles Boyle, who worked his
4 way up as from a clerk to the position of Vice President of OneWest Bank, could not explain
5 why the variance occurred. He testified on the stand, "sometimes, we stamped a copy."

6 This Court asked to see the original at the hearing and defense counsel, Julie Vacura, Esq.,
7 handed it up to the bench. Plaintiff stated for the record that he challenges the authenticity of
8 the so-called original Note. Based on the development at the evidentiary hearing, Plaintiff
9 researched further and discovered that Dr. James Kelley, has the equipment and skills
10 necessary to detect forgery of documents via electronic means and can render his factual
11 findings on the issue of whether the original Note currently in defense counsel's position is the
12 authentic and only original. Dr. Kelley is located in Saratoga, California (Exhibit 1, Summary
13 of Dr. Kelley's credentials).

14 Because OneWest has intentionally obscured the issue of whether the Note is original,
15 OneWest must arrange for the examination/inspection of the Note by Dr. Kelley and pay for
16 the costs associated with the examination. FRCP 26(b)(4)(C)(i). The Plaintiff requests the
17 Court to continue the present summary judgment hearing and trial date to allow the
18 examination by Dr. Kelley as his findings will aid the fact-finder in the ultimate issue of
19 whether the document proposed by OneWest and its attorney is the original promissory Note
20 executed by the Plaintiff.

21 II. LEGAL AUTHORITY

22 Because OneWest has placed the authenticity of the Note in issue, Plaintiff is entitled
23 to have the article examined by Dr. Kelley. FCRP 34 (a)(2). Even though Plaintiff is required
24

1 to serve OneWest with a request pursuant to FRCP 34(a), the development at the evidentiary
 2 hearing and the looming trial date render a formal request impracticable. Because defense
 3 counsel currently possesses the document and defense counsel has offered the Court a visual
 4 inspection at the evidentiary hearing, Dr. Kelley's examination of the article does not intrude
 5 upon anyone's privacy, trade secret or constitute a burden upon OneWest. Dr. Kelley should
 6 then be allowed to examine the document and render his findings as a fact witness or a
 7 testifying-only expert.

8 Plaintiff has a substantial need to verify the authenticity of the document and it is
 9 impossible for him to do so without Dr. Kelley's actual examination of it. *Belcher v. Bassett*
 10 *Furniture Indus.*, 588 F.2d 904, 908 (4th Cir.1978) (the moving party need to show only that
 11 the desired discovery is relevant to the cause of action); *National Dairy Products Corp. v. L.D.*
 12 *Schreiber & Co. Inc.*, 61 F.R.D. 581, 583 (E.D.Wis.1973)(Courts insure that the anticipated
 13 benefits are real and necessary, and that the burdens will not be intolerable); *United States v.*
 14 *National Steel Corp.*, 26 F.R.D. 1960) (S.D.Tex.1960)(same).

15 This Court has in *Selvar v. Western Towboat Co.*, 2012 U.S. Dist. LEXIS 157809
 16 (W.D. Wash.2012), granted Plaintiff the right to inspect the defendant's tug boat and held,
 17 "When parties do not agree whether a request for inspection is appropriate, 'the degree to
 18 which the proposed inspection will aid in the search for truth must be balanced against the
 19 burdens and danger created by the inspection.'" (*Citing to New York State Ass'n for Retarded*
 20 *Children Inc., v. Carey*, 706 F.2d 956, 961 (2d Cir.1983)). Since OneWest has always been
 21 eager and ready to produce the purported original Note as evidence of its holder status and thus
 22 authority to enforce and foreclose, no burden is discerned from allowing the document to be
 23 examined. The potential aide in the search for truth, under the facts of this case, is apparent
 24

1 and paramount to the Court's determination of the issue of whether the Note OneWest sought
2 to enforce is the genuine original.

3 **V. CONCLUSION**

4 Plaintiff respectfully prays the Court to order OneWest to make available the Note for
5 Dr. Kelley to examine for its authenticity as soon as practicable. Plaintiff prays the Court to
6 order OneWest to bear the expenses incurred in making said examination possible, and
7 Plaintiff prays the Court to add Dr. Kelley to Plaintiff's witness list as a fact/testifying expert
8 for purposes of summary judgment and trial.

9 Respectfully Submitted this 15th day of February, 2013.

10 /s/ Ha Thu Dao

11 _____
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CERTIFICATE OF SERVICE

I hereby certify on February 15, 2013, the foregoing document is being served via
___First Class Mail ___Priority Mail, ___Messenger Service ___Facsimile ___Electronic
Mail___X___ECF, upon the following parties:

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